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No. 91-453

In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,
Petitioner,

vs.

SOUTH CAROLINA COASTAL COUNCIL,
Respondent.

On Writ of Certiorari To The
Supreme Court Of South Carolina

BRIEF OF AMICI CURIAE BROWARD COUNTY, LEON COUNTY, MANATEE COUNTY AND THE CITY OF NORTH MIAMI BEACH IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICI CURIAE

The local governments participating in this amici curiae brief have a vital interest in the instant case since they are charged with the protection of the health, safety, and welfare of their citizens. The local governments participating in this amici curiae brief believe that the preservation of sensitive natural resources through local government regulation is essential to the continued health, safety, and welfare of their citizens.

Pursuant to Rule 37.5 of the Rules of the Supreme Court of the

United States, the participants in this amici curiae brief, as political subdivisions of states, do not need the consent of either party to file this brief on behalf of respondent.

SUMMARY OF ARGUMENT

In the instant case, this Court must decide whether the property rights guaranteed by the Fifth Amendment to the United States Constitution include the right to use one's property in such a way as to cause a harm to the public. If this Court agrees with respondent that one's right to property does not include the right to use that property in a way that will harm the public, this Court must then address respondent's assertion, upheld by the South Carolina Supreme Court, that the destruction of a sensitive natural resource such as a coastal area or a wetland causes a public harm.

The Fifth Amendment guarantees that "private property shall not be taken for public use, without just compensation." U.S. Const. amend. V. When a governmental regulation of land affects the value of property so profoundly as to deny all economically viable use of the land, the governmental entity must compensate the property owner. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). However, the governmental entity is not required to compensate a property owner for prohibiting uses of the land which would cause a public harm. Id. at 491.

In the instant case, the South Carolina Supreme Court upheld a statute which prohibited development in certain coastal areas. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991). The court found that the statute prevented a public harm because it prohibited the use of the land in ways which would have resulted in destruction of the coastal ecosystem. Id. at 901. Therefore, the court held that the property owner was not entitled to compensation because the statute did not result in a taking, although the property owner had been denied all economically viable use of the land. Id.

The South Carolina Supreme Court's decision in the instant

case follows an emerging theory in property rights jurisprudence. Just as the right to bear arms or the right to free speech is not an unlimited right, the right to use private property is not absolute. L.C. Becker, *Property Rights: Philisophic Foundations* 2 (1983). The right of landowners to use their property must be weighed against the right of the public to be free from the harm caused by certain uses of sensitive natural resources. D.B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 Harv. Envtl. L. Rev. 311 (1989).

In balancing the right of a property owner against the right of the public to be free from harm, courts must view land as more than property. Courts must look to the role of land as part of a living system. This living system is a community of interdependent parts, typically refered to as an "ecosystem" or the "environment."[1] Individuals are also a part of this living system and anything which affects land eventually affects individuals. Therefore, a property owner should not be allowed to exploit his or her property in such a way as to cause harm to the public.

ARGUMENT

A. The origin of property rights and their relation to land

James Madison, one of the most ardent proponents of the takings clause of the Fifth Amendment before it was ratified, intended the clause to guarantee the inviolability of one's right to possess private property. W.M. Treanor, *The Origins and Original Signifi-*

1. Aldo Leopold explained the living system of which land and humans are a part as a "pyramid." In this pyramid, energy flows from one level to the next, proceeding from the soil on up to large carnivores. Each level of the pyramid is dependent upon every other level for survival. Whenever a level of the pyramid is destroyed or altered, the other levels of the pyramid are affected.

As Leopold noted, each level of the pyramid is always in some way changing. Human induced changes, however, tend to be much more catastrophic than change wrought by nature. Thus, human induced changes are more likely to radically affect and, perhaps, break down the pyramid. A Leopold, *A Sand County Almanac* 214-220 (1987).

cance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 712 (1986). Madison's intent, however, was that the takings clause apply only to physical takings, as is evidenced by his draft of the clause: "No person shall be obliged . . . to *relinquish* his property, where it may be necessary for public use without just compensation." *Id.* n.22; id. at 711 n.95 (emphasis added). As with the entirety of the Bill of Rights, the takings clause of the Fifth Amendment was passed to protect the rights of the individual from governmental or majoritarian interference.

No right guaranteed by the Constitution, however, is absolute. The determination of the extent to which each right protects an individual's actions, whether it is one of free speech, the right to bear arms, or the right to possess private property, is always a balance between the protection of the individual versus the protection of society. L.C. Becker, *supra* at 2. In the case of property rights, the question is whether the Fifth Amendment guarantees a property owner the right to exploit his or her property in such a manner as to threaten the health, safety, and welfare of individuals.

Only in the last twenty-five years have Americans come to recognize that their health, safety, and welfare are inextricably linked with the health of the environment.[2] Statutory law developed relatively quickly in response to this new cognizance of the individual's role within the environment. The courts, however, particularly in the area of takings jurisprudence and what constitutes a "property right" in relation to the destruction of natural ecosystems, are only now beginning to examine outdated jurisprudence. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *McNulty v. Town of Indialantic*, 727 F.Supp. 604 (M.D. Fla. 1989); *Graham v. Estuary Properties*, Inc., 399 So.2d 1374 (Fla. 1981); *Just v. Marinette*

2. As one recent commentator noted, it was during the 1960's, when society wrestled with the devastating effect pesticides had on birds and other mammals, that people came to realize that, as technologically advanced as society might grow, individuals were still a part of the environment and subject to its rules, rather than its master. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 Harv. Envtl. L. Rev. 311, 314 (1989).

County, 201 N.W.2d 761 (Wis. 1972).

Takings jurisprudence has traditionally viewed land from only one perspective -- land as "property." The Fifth Amendment to the United States Constitution primarily protects a person's economic interest in land. Hunter, *supra*, at 311. It is only when land is viewed economically, i.e. as a commodity, that it becomes property.[3] The concept of land as property is useful and necessary in a free market economy. However, this narrow perspective is inhibitive and damaging if it is a court's only focus when contemplating the rights guaranteed by the takings clause of the Fifth Amendment. A court must look beyond land's economic value in order to recognize the land's value to the public in the maintenance of society's health, safety, and welfare.

In the instant case, the South Carolina Supreme Court took an enlightened view as to what constituted a property right. The court went beyond the concept of land as solely "property." *Lucas*, 404 S.E.2d at 898. The court analyzed the South Carolina statute from a wider perspective, one which took into account the value of the land as a sensitive natural resource which was part of a living system, as well as the monetary value of the land to the landowner. The court concluded that property rights did not include the right to harm the public by destroying a sensitive natural resource. Id. at 902.

In order to determine what constitutes a property right, this Court will have to balance the right of the individual to use his or her property against the right of others not to be adversely affected by that individual's actions. It is imperative, in making this determination, that this Court also view land as part of a living system, because individuals are a part of this living system. Any action which destroys a part of the living system adversely affects individuals.

3. Although the takings clause also protects a person's basic right to hold private property by stating that property can only be taken for "a public purpose," because states are often given tremendous leeway in the use of police power and what constitutes a "public purpose," the clause's greatest protection of private property rights enures through its guarantee of compensation should the property be "taken."

B. **Takings Analysis**

In deciding whether a regulatory taking has occurred, courts have considered four factors. First, the courts determine whether the nature of the government's interference is an actual invasion of the property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). With one exception, a taking occurs where the governmental regulation results in a physical invasion of the land and, if the regulation is a valid exercise of police power, the landowner must be compensated. Id. If the regulation is not a valid exercise of police power, than the regulation is invalidated and the landowner may seek compensation for the time the regulation affected his or her property. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). The one exception to this physical invasion rule arises if the regulation prevents a public harm. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

The courts next determine whether the regulation was a valid exercise of police power. *Id.* The validity of the police power requires a two part examination: (1) the regulation must have been enacted for a public purpose; and (2) the regulation cannot be arbitrary or unreasonable. Id.

The third factor the courts consider is the diminution in the value of the land caused by the regulation. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Diminution in value is balanced against the amount of public benefit or prevention of public harm gained from the regulation. *Id.* The greater the benefit gained or harm prevented, the less likely a taking has occurred.

The last factor the courts consider is the extent the property owner's distinct investment backed expectations were dashed by the regulation. *Keystone*, 480 U.S. at 485. For instance, if the property owner bought the property in full realization that certain governmental restrictions prohibited development of the property, then the property owner lacks distinct investment backed expectations and the landowner's takings claim, as long as the regulation is a valid exercise of police power, will fail. *Ciampitti v. U.S.*, 22 Cl.Ct. 310 (1991).

The South Carolina legislature in the instant case enacted a statute prohibiting the construction on coastal property beyond a certain setback line. *Lucas*, 404 S.E.2d at 895. The legislature, in the findings and policy section of the statute, stated the statute was enacted in order "to protect life and property by serving as a storm barrier," as well as to preserve the "habitat for numerous species of plants and animals, several of which are threatened or endangered." 404 S.E.2d at 897. The South Carolina Supreme Court ruled that the statute was not a taking because it prevented a public harm by ensuring safety through the preservation of the coastline as a storm barrier, as well as the preservation of the coastline's function as a sensitive natural resource. Id. at 901. The opinion of the South Carolina Supreme Court adopted the emerging theory that regulations preventing public harm by prohibiting the destruction of certain sensitive natural resources are not takings although such regulations preclude all economically viable use of the property.

Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972) was the first instance wherein a court determined that a regulation enacted to prohibit the development of sensitive natural resources, the destruction of which would cause a public harm, was not a taking of the land even though all economically viable use of the land was precluded. Similar to the instant case, the property owner in *Just* challenged a regulation which protected the shore of Wisconsin's lakes against development beyond a certain setback from the water. *Id.* at 764. In upholding the shoreline protection regulations against the property owner's challenge that the government action effected a taking, the Wisconsin Supreme Court stated the "necessity for monetary compensation for loss suffered to an owner by police power restriction arises when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm." *Id.* at 767.

The court in *Just* crystallized a previously ambiguous notion--a person's private property right does not include the right to destroy natural resources if such destruction resulted in public harm. *Id.* at 768. Fifteen years later, in *Keystone*, this Court introduced a similar jurisprudence in regard to the property rights guaranteed by the Fifth Amendment to the United States Constitution. 480 U.S. at 491-92.

Keystone was not decided solely on a prevention of public harm theory. This Court, however, in deciding that the governmental regulation prohibiting coal mining in certain areas was not a taking, stated that the property right guarantee does not include the right to use one's property in such a way as to harm the public. *Id.*

In *Keystone*, this Court referred to Justice Holmes' "reciprocity of advantage" theory set forth in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and elaborated that, although the value of a landowner's property might diminish somewhat due to governmental restriction, the landowner, as a member of society as a whole, benefitted from the imposition of such restrictions because a public harm was prevented. *Id.* at 491. This Court stressed in *Keystone* that, although the diminution in the value of the property must be looked to in determining whether a taking had occurred, the takings clause was not intended to "require the States or the courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received." *Id.* at 491 n.21. Implicit in this Court's analysis in *Keystone*, as well as other takings cases this Court has decided, is that the takings analysis was never meant to be a scientific process. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The takings analysis by necessity weighs each factor in the case, i.e the good promoted or harm prevented, loss in investment backed expectations, and decline in value of the property, to determine what would constitute a fair decision.

Similar to the South Carolina Supreme Court in the instant case, a number of state supreme court decisions and lower federal court decisions have adopted the *Keystone* prevention of public harm theory to protect irreplaceable natural resources. *McNulty v. Town of Indialantic*, 727 F.Supp. 604 (M.D. Fla. 1989); *Graham v. Estuary Properties*, Inc., 399 So.2d 1374 (Fla. 1981). Two recent claims court cases, however, have refused to give the theory credibility. Both *Loveladies Harbor, Inc. v. U.S.*, 21 Cl.Ct. 153 (1990), and *Florida Rock Industries, Inc. v. U.S.*, 21 Cl.Ct. 161 (1990), dismissed the theory that the prevention of the destruction of wetlands did not constitute a taking because such prevention avoided a public harm. In

both cases the claims court found that a taking occurred.

The facts of *Loveladies* and *Florida Rock* are similar to each other. In each case, the landowner brought a challenge against an Army Corps of Engineers ("Corps") denial of a dredge and fill permit. In each case the claims court found there was no economically viable use left in the land after the Corps permit denial. Therefore, both courts held a taking had occurred. The claims court refused in either case to entertain the theory, upheld in *Keystone*, that a regulation prohibiting the development or use of sensitive natural resources, the destruction of which would have caused a public harm, was not a taking.

The court in *Florida Rock* lightly dismissed the Corps' assertion that the Corps was preventing a public harm by prohibiting mining on wetlands contiguous to the Florida Everglades. The court stated that no evidence was introduced at trial showing that pollution would have been caused by the proposed mining activity. Further, the court found that even if evidence as to pollution had been introduced, it was "clear that the nuisance exception to the fifth amendment's requirement of just compensation [was] inappropriate" in that instance. 21 Cl.Ct. at 173. The mining of wetlands, the court stated, did not cause the type of harm that could be defined as a nuisance. *Id.*

It is generally understood that a nuisance is an act which results in injury to a specific person or to the public as a whole. 58 Am. Jur. 2d, *Nuisances* § 1. The court's statement regarding the applicability of the nuisance exception implies the court did not believe the pollution, habitat destruction, and loss of water recharge area which would have been caused by the mining of the wetlands constituted an injury to the health, safety, and welfare of the citizens of South Florida. However, the environmental sciences have proven time and again that certain sensitive natural ecosystems are vital to our continued health, safety, and welfare as humans. *See*, e.g., J.G. Gosselink and W.J. Mitsch, *Wetlands* 393-406 (1986).

The flaw in the claims court's reasoning in holding that the nuisance exception does not apply is further demonstrated in the

court's failure to explain why the public harm exception was applicable in *Keystone* but not applicable in *Florida Rock*. In both *Florida Rock* and *Keystone* the regulations being challenged as a taking concerned mining activities. In *Keystone*, the mining activity would have caused subsidence to the land above, while in *Florida Rock*, the mining activity would have caused pollution, habitat destruction, and loss of water recharge area. The logical extension of the court's decision in *Florida Rock* is that subsidence threatened in *Keystone* was a greater harm than the mining activity in *Florida Rock*. Once again, however, the court failed to explain why the subsidence as a result of the mining in *Keystone* was a greater threat than the pollution and other deleterious effects of mining in wetlands in *Florida Rock*.

Florida Rock and *Loveladies Harbor* failed to recognize the effect of the development and mining of wetlands. Further, *Loveladies* and *Florida Rock* reduced the takings analysis to a number crunching exercise, something that this Court stated the takings analysis was never meant to be. *Keystone*, 480 U.S. at 491-92. *Loveladies* and *Florida Rock* focused almost exclusively on the comparison of fair market value of the land before and after the governmental regulations affected the land. Both cases virtually ignored the purpose that the governmental regulation sought to further, the prevention of destruction of sensitive natural resources which were a vital part of a living system. The very heart of the takings analysis was overlooked in *Florida Rock* and *Loveladies* -- that a court should balance the importance of the governmental purpose in enacting the regulation against the detriment to the landowner.

CONCLUSION

This Court should affirm the South Carolina Supreme Court's decision in the instant case. The South Carolina's Supreme Court's decision adopted an expansive view of "land." In one aspect, land is property. Property owners are afforded certain rights under the Fifth Amendment to the United States Constitution. Land, however, is also a public resource. Although through legal fiction land may be divided into tracts, in reality, land as a whole is a vital part of a living system of which individuals are a part. If a property owner's actions destroy a part of this living system, individuals are harmed. The importance of land as part of a living system and the harm that results from the destruction of certain sensitive natural resources has been empirically proven.

Therefore, the right to private ownership of land must be balanced against the right of individuals not to be harmed by the actions of property owners in utilizing such land. Under the United States Constitution, a person has a right to bear arms, but one does not have the right to use those arms to kill others. Individuals, likewise, have the right to free speech, yet one may not incite violence through the use of speech. In a similar light, a person has the right to private property under the fifth amendment. Yet one does not have the right to use such land in a way that would cause harm to the public.

Respectfully submitted,

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